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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

EVANGLIN MCCAIN, Plaintiff and Appellant, v. A.F. EVANS COMPANY, INC., et al., Defendants and Respondents.	C074902 (Super. Ct. No. 34-2008-00023245-CU-BT-GDS)

Plaintiff and appellant Reverend Evanglin McCain appeals from the judgment against him in his suit against defendants and respondents A.F. Evans Company, Inc., Kim Wolcott, and Mary Smith regarding conditions at Countrywood Village Apartments.[1]

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[1] Appellant's third amended complaint named as defendants A.F. Evans Company, Inc., Countrywood Village Apartments, Arthur F. Evans, John Rimbach, Maureen Drotleff, Richard Bell, Kim Wolcott, Mary Smith, Holly Doe, Felicia or Alicia Doe, and other Does. In appellant's opening brief, A.F. Evans Company, Inc., Kim Wolcott and Mary Smith are named as respondents and defendants.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's Complaints Regarding Conditions at His Apartment

In November 2007 the entry gate to the Countrywood Village Apartments became inoperable. Appellant complained to the apartment community manager, Mary Smith, that drug dealers were congregating around the mailboxes and other illegal activity was occurring due to the broken gate. In 2008 the door to appellant's apartment was forced and his unit burglarized. Appellant complained that the door was not repaired properly. Appellant had other complaints about the condition of his apartment. The door to the stove had separated from the oven. The cover of the thermostat was missing. The air filter on the fan had not been changed in two years. The apartment had not been cleaned. In January 2009 the ceiling leaked water from a light receptacle in the kitchen and flooded his floor.

According to Smith, appellant's door was fully repaired and the air filter replaced, and he was given a concession on the rent to have the carpet cleaned. Smith stated that she never received a complaint from appellant about the stove and the oven. Regarding the water leak, appellant had contacted a maintenance technician directly and the technician had gone to his apartment.

The Litigation

On September 29, 2008, appellant filed a complaint in propria persona for negligence, personal loss, mental anguish, punitive damages, retaliatory conduct, and violation of Civil Code section 1942.5. On December 30, 2008, the court sustained a demurrer with leave to amend that the complaint was uncertain. On January 20, 2009, appellant filed a third amended complaint[2] asserting claims for unlawful business practice (Bus. & Prof. Code, § 17200), nuisance, intentional infliction of emotional

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[2] There is no reference to a first or second amended complaint in the record.

distress, negligent violation of a statutory duty (Civ. Code, §§ 1714, 1941.1), aiding and abetting, breach of contract, breach of the warranty of habitability, landlord's agent liability, constructive eviction, and retaliation.[3] On May 7, 2009, the court overruled the defendants' special demurrer and denied their motion to strike. On May 19, 2009, the defendants filed an answer.

Thereafter, appellant filed a demurrer to the answer, a demurrer to the amended answer, multiple motions for sanctions against defense counsel, a motion for summary judgment, and multiple discovery motions. A number of appellant's motions were denied in whole or in part because of defective service of notice and other forms of procedural noncompliance.

On May 31, 2012, the trial court denied two of appellant's motions to compel production of documents as "incomprehensible." In one motion, the court noted that appellant had filed a 20-page memorandum in violation of California Rules of Court, rule 3.1113(d), and "further obfuscat[ed] matters by his references to the Code of Federal Regulations, the Brady Rule, the Magna Charta [*sic*], and Thomas Jefferson, among others." In the other motion to compel documents, the court noted that appellant cited the code provision for untimely responses to interrogatories and argued that opposing counsel had failed to produce a key witness.

Appellant's Motions for Appointment of Counsel

Appellant brought multiple motions for appointment of civil counsel under the Sargent Shriver Civil Counsel Act ("Shriver Act"), Government Code sections 68650 and 68651, a statute adopted by the Legislature to develop model pilot projects in selected

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[3] In the third amended complaint, appellant alleged that he was a resident of Countrywide Village Apartments in Sacramento. By April 7, 2009, appellant listed a Sacramento post office box as his address on court filings, and by November 30, 2009, appellant listed his address as an apartment in Compton, California.

courts to provide legal representation in civil matters to low-income residents. On April 4, 2011, the trial court denied appellant's motion without prejudice as premature because the pilot projects were not set to commence until July 1, 2011. On July 5, 2011, and August 30, 2011, the motion was dropped from the court's calendar for defective service of notice. On August 10, 2011, the trial court denied the motion in part because appellant failed to show that a model project had been established in Sacramento County.

On May 30, 2012, appellant's unopposed motion for appointment of counsel was dropped. The trial court noted that "this Court does not determine who may or may not be entitled to counsel" under the Shriver Act. The court encouraged appellant to "contact Voluntary Legal Services of Northern California," the "Los Angeles Center for Law and Justice," or "another legal aid clinic to determine if he may qualify for assistance" under the Shriver Act. The court's order included telephone numbers for both named legal services agencies.

Appellant remained self-represented and his difficulties in motion practice continued. On August 16, 2012, the trial court denied appellant's motion for fraud on the courts by defense counsel, and on August 24, 2012, his motion against defense counsel for witness tampering, in both instances stating the motion was "unintelligible" and it was "unclear what relief is sought on what grounds." In the August 16 order, the court further noted that the "motion is in large part based on federal law and federal rules which have no application in the present case." In both instances, the court did not permit oral argument based on its review of the papers.

The Unlawful Detainer Trial

On January 22, 2009, a bench trial was conducted in a separate unlawful detainer proceeding brought by Countrywood Village Associates, L.P. against appellant. The period at issue was from the first date appellant failed to pay rent, September 1, 2008, to the date of the trial.

Countrywide Village Associates L.P.'s sole witness, Smith, testified that appellant failed to pay rent for the rental period September 1, 2008, through December 31, 2008. Based on this showing of failure to pay rent, the court ruled that, under Civil Code section 1942.5, appellant was precluded from introducing evidence on the defense of retaliatory eviction. (Civ. Code, § 1942.5, subd. (a); Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2018) ¶ 7:353, at pp. 7-180 ["**Rent must be current:** Relief under §1942.5(a) (by way of defense or affirmative civil action) is *not* available to tenants who are in default in the payment of rent"]; *Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 740 [retaliatory eviction defense "not available to a tenant who is himself at legal fault"].)

Appellant presented evidence in support of the defense of breach of the warranty of habitability. Appellant questioned Smith regarding appellant's complaints that the carpet had never been cleaned and the air filter not been changed in two years. Smith testified that Countrywood Village Apartments had given appellant a concession on the rent to clean the carpet and replaced the air filter. Smith also testified that the door had been repaired after the break-in and burglary. Appellant offered in evidence a photo showing the lack of repairs to the apartment door and a broken oven door.

Appellant himself testified regarding the broken security gate, front door and oven door, and the missing cover on the thermostat. Appellant testified that on January 16, 2009, he returned to find his kitchen flooded with water. Appellant further testified that he had requested repair of the front door, stove, and leaking ceiling. Smith testified in rebuttal that appellant never asked for repair of the oven and stove and she was notified about the ceiling leak only shortly before the trial.

In ruling for the plaintiff, the court found "as a matter of law, that the issues with the dirty carpet, the air filters and the door issues do not rise to a breach of the warranty of habitability and the substantial weight of evidence supports the fact that all items had been remedied prior to the service of the three-day notice, prior to the neglect on behalf

of the defendant to pay rent as requested in the three-day notice; that is, September 1st, 2008." The court further found "that any ceiling leak in the unit is recent and does not affect the landlord's rights to recover possession of the property in that the damage to the unit, based upon any potential water leak, is recent and that it just occurred over the past couple days." The court concluded that it "found no evidence that the unit, as the evidence has borne out, fell below any standard that would indicate to the court that habitability has been compromised or placed in issue. These are minor inconveniences that the landlord is not required to remedy as a matter of overcoming a breach of the . . . warranty of habitability. [¶] These are issues that occur every day in apartments . . . [¶] . . . [¶] . . . all across the country -- [¶] . . . [¶] [and] that once complained about, the landlord made prompt repairs."

Evidentiary Sanction for Appellant's Failure to Comply with the Court's Order to Attend His Deposition

On October 12, 2011, the trial court granted a motion to compel appellant's deposition. The court's order noted that appellant's deposition had been continued for six months based on a note from his doctor that health issues prevented appellant from traveling. However, on August 31, 2011, appellant faxed a letter to opposing counsel confirming his deposition on September 6. Appellant did not appear on September 6, claiming that he wrote "upon release from my doctor" on the confirmation letter. This language did not appear on the faxed confirmation letter received by defense counsel. Appellant did not otherwise inform counsel that he would not appear. In opposition to the motion, appellant accused defense counsel of altering the letter, but the court found no evidence of alteration in the copy of the letter defense counsel submitted to the court.

To minimize appellant's travel, the court ordered the parties to meet and confer on a deposition location closer to his home. The deposition was to be completed no later than December 12, 2011.

On March 27, 2013, the trial court ruled on a motion for terminating sanctions based on appellant's failure to comply with the order to attend his deposition. The court noted that the defendants had noticed appellant's deposition for December 6, 2011, at a location approximately 13 miles from appellant's residence. Appellant had produced a letter from his doctor claiming that appellant was unable to be deposed. The defendants then took the deposition of the doctor who testified appellant could be deposed. The defendants served a fourth notice of deposition for February 8, 2013, but appellant failed to appear. Appellant's opposition to the motion consisted of two affidavits attacking the ethics of defense counsel. The trial court concluded that evidentiary sanctions, rather than terminating sanctions, were appropriate and ruled that appellant was precluded from testifying at trial and precluded from offering any declaration or affidavit on any substantive matter in the litigation.

The Trial

On July 29, 2013, the trial of appellant's suit commenced with a hearing on the parties' motions in limine. The court granted the defendants' motion to preclude appellant from testifying based on the discovery sanctions order. At the request of both appellant and the defendants, the court admitted the transcript of the unlawful detainer trial.

Appellant argued that the court should not hold him to the same standard as an attorney. The judge indicated that it was not his judicial philosophy to be a stickler on the rules, so "there can be a little wiggle room," but advised appellant that "as a judge I can't excuse somebody for not meeting legal requirements because they're not a lawyer, and I can't give legal advice, and I can't take sides."

The trial court on its own motion bifurcated the trial with the unlawful business practice claim (Bus. & Prof. Code, § 17200) to be tried first. The court reasoned "given the intertwining of the potential collateral estoppel and res judicata issues together with

there being a number of technical issues concerning the nature and quantity of proof that's required under some of these claims that it would be in the interest of judicial economy to try the 17200 claims first." The trial court explained to appellant that he had not waived his right to jury trial, but that the equitable claim was being tried first. The court advised appellant that "[to] be candid with you, in most cases when that's done since the issues are really the same, then there's nothing left for the jury trial part . . . ."

After appellant completed his opening statement, the defendants made an oral motion for nonsuit, which the court granted as to all defendants but A.F. Evans Company, Inc. and Countrywood Village Apartments. The trial continued with appellant calling several witnesses and offering documents and photographs as exhibits.

Throughout the trial, the court made numerous efforts to explain trial procedure to appellant, including (1) the process of marking, offering and admitting exhibits, (2) the hearsay rule, (3) the scope of the trial as defined by the allegations in the third amended complaint, and (4) the defendant's limited evidentiary burden at trial. To illustrate the difference between evidence considered at trial versus documents filed in the case, the court suggested that appellant "think like a large bucket or basket of facts sitting there on the floor or on the table that the fact finder -- the jury or the Court -- gets to consider in deciding whether the facts alleged in the complaint have been proven or not." The court explained that if an item is not moved into evidence, it is not in the "basket" even if it is in the court file. The court also suggested that defense counsel stipulate to foundation for some documents appellant offered as exhibits to address his inability to testify, remarking that while the court intended to be "100 percent correct on the rules of procedure, we are dealing with a pro per here . . . ."

The trial court repeatedly explained to appellant that it did not have the authority to reconsider pretrial rulings of other judges, including the discovery sanctions order and the rulings made in the unlawful detainer proceeding. When appellant complained about the sanctions order specifically, the court observed, "I do feel constrained to point out

that the sanctions order was issued because you failed on multiple occasions to present yourself for a deposition."

On September 25, 2013, after appellant rested, the remaining defendants made an oral motion for nonsuit, which the court granted. In the process of ruling on the motion, the trial court reviewed the other causes of action pled in the third amended complaint as "foundational elements" of appellant's Business and Professions Code section 17200 claim. The court granted nonsuit on the section 17200 claim on the basis that the other causes of action could not be proven, noting that the discovery sanctions order limited the evidence appellant could present and the unlawful detainer decision had disposed of a number of issues. The court concluded there was nothing left for the jury to decide, and judgment should be entered for the defendants. On October 25, 2013, the court entered judgment.[4]

DISCUSSION

1. Appointment of Civil Counsel

Appellant contends that as an indigent litigant he was entitled to appointment of counsel, highlighting his difficulty in presenting his case and comments from the court in pretrial proceedings that his submissions were "incomprehensible" or "unintelligible."

As appellant acknowledges, there is no due process right to counsel in a civil case, no matter the poverty of the litigant, unless the litigant might lose his or her physical freedom as a result. (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 25

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[4] Appellant filed his notice of appeal prematurely on October 4, 2013, after the trial court had announced its intended ruling but before judgment had been rendered. We have exercised our discretion under California Rules of Court, rule 8.104(d)(2), to treat the notice of appeal as filed immediately after the entry of judgment. (*National Grange of Order of Patrons of Husbandry v. California Guild* (2017) 17 Cal.App.5th 1130, 1143, fn. 8 [exercising discretion to treat notice of appeal from summary judgment order as appeal from subsequent judgment].)

[68 L.Ed.2d 640]; *Hunt v. Hackett* (1973) 36 Cal.App.3d 134, 137; *Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1503.) Appellant does not claim that his physical liberty was at stake in this suit. Thus, there is no due process basis for appointment of civil counsel for appellant.

Alternatively, appellant identifies the Shriver Act as a statutory basis for appointment of civil counsel. The Shriver Act funded the development of pilot projects to appoint legal counsel "to represent low-income parties in civil matters involving critical issues affecting basic human needs . . . ." (Gov. Code, § 68651, subd. (a).) The statute identifies "housing-related matters" as one such matter. (*Id.*, subd. (b)(1).) The income threshold for eligibility is household income "at or below 200 percent of the federal poverty level." (*Ibid.*) Appellant maintains that he qualified for appointment of counsel under the Shriver Act based on the nature of his case and his income.

However, as appellant was informed, the trial court does not determine eligibility for representation under the Shriver Act or obtain counsel for qualified individuals. This task falls to legal services agencies that serve low-income clients in the areas included in the pilot projects. (Gov. Code, § 68651, subd. (b)(4).) "The lead legal services agency shall be the central point of contact for receipt of referrals to the project and to make determinations of eligibility based on uniform criteria. The lead legal services agency shall be responsible for providing representation to the clients or referring the matter to one of the organization or individual providers with whom the lead legal services agency contracts to provide the service." (*Ibid.*)

Under the Shriver Act, the court or another agency refers potential clients to the lead services agency, which collects information to assess whether the case should be served. (Gov. Code, § 68651, subd. (b)(7).) Here, the trial court referred appellant to Voluntary Legal Services of Northern California, in Sacramento County where he filed this litigation, and the Los Angeles Center for Law and Justice, where he was living at the time, which were lead legal services agencies responsible under the Shriver Act to

determine his eligibility and obtain counsel for him if he qualified. Appellant does not indicate that he took any action in response to the court's referral. Even if appellant had done so, there was no guarantee of representation under the Shriver Act, which acknowledges that "not all indigent parties can be afforded representation, even when they have meritorious cases . . . ." (Gov. Code, § 68651, subd. (b)(4).)

Appellant has not established a due process or statutory right to appointment of civil counsel to represent him.

2. Leniency and Due Process

Appellant contends that, as a litigant unable to afford counsel and required to represent himself, the court should have treated him with leniency and not held him to the same standard as an attorney. In a related argument, appellant contends he was denied due process when the trial court denied his pretrial motions for defective service of notice, pronounced his moving papers "incomprehensible" and "unintelligible," and did not allow oral hearings on certain of his motions. According to appellant, the trial court allowed defense counsel to engage in the same conduct for which appellant was sanctioned.

It is well established that a party choosing to act as his or her own attorney is entitled to the same but no greater consideration as other parties and attorneys. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247 (*Nwosu*); *Stover v. Bruntz* (2017) 12 Cal.App.5th 19, 31.) A doctrine generally permitting exceptional treatment of self-represented parties would lead to a quagmire in the courts and would be unfair to other parties in litigation. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985; *Burkes v. Robertson* (2018) 26 Cal.App.5th 334, 345; see also *Scholes v. Lambirth Trucking Co.* (2017) 10 Cal.App.5th 590, 595; *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 208; *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1055 [" ' "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of

evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.' [Citations.] . . ." ' [Citation.]"].) Due process does not require the trial court to suspend procedural requirements for self-represented litigants because they are more prone to error. (*McNeil v. United States* (1993) 508 U.S. 106, 113 [124 L.Ed.2d 21] ["we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel"].)

Trial judges, however, must acknowledge that self-represented litigants do not have an attorney's level of knowledge about the legal system and are more likely to misunderstand the court's requirements. Accordingly, judges should provide basic explanations about court proceedings to self-represented litigants and answer their questions in plain English, avoiding legalese. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284; *Petrosyan v. Prince Corp.* (2013) 223 Cal.App.4th 587, 594.)

As mentioned, appellant focuses on pretrial rulings in which a judge pronounced his submissions "incomprehensible" and "unintelligible" and refused to allow oral argument on two occasions. However, the same judge referred appellant to two legal services agencies to determine his eligibility under the Shriver Act pilot program and potentially have counsel appointed for him. Despite appellant's numerous motions seeking such relief, there is no indication in the record that appellant availed himself of the court's referral.

In addition, the judge presiding over the trial made every effort to explain to appellant what was required for him to present his case and gave him ample opportunity to do so. The judge explained the nature of evidence with a "bucket or basket" metaphor to ensure that appellant fully understood the difference between documents on file in the case and evidence considered by the trier of fact. The trial court let it be known to appellant and opposing counsel that he was not stickler and would allow some "wiggle

room." The judge even attempted to obtain the cooperation of opposing counsel in allowing appellant to meet foundational requirements to admit documents into evidence—cooperation made necessary by the discovery sanction appellant incurred in endeavoring to avoid his deposition.

Finally, review of the record does not support appellant's claim that defense attorneys received more favorable treatment—to the contrary, the record indicates that appellant's claims of misconduct against opposing counsel were spurious. The factual basis for the evidentiary sanction that prevented appellant from testifying at trial is well documented in the court's orders. Appellant does not direct us to anything in the record regarding equivalent conduct on the part of defense counsel. Rather, we note that, in ruling on the motion to compel appellant's deposition, the trial court reviewed the letter from appellant confirming his deposition and rejected his claim that defense counsel destroyed or altered the document. In addition, on April 7, 2010, the court denied one of appellant's several motions for sanctions against opposing counsel—this one for violation of "unspecified" court orders—ruling that appellant "has failed to identify any court order which was violated by opposing counsel and has failed to cite any authority pursuant to which this Court can award monetary sanctions for such alleged violations."

3. Single Judge Assignment

Appellant contends this case should have been assigned to a single judge. He claims he was unfairly prejudiced because subsequent judges were unable to reconsider and overrule the rulings of previous judges that he believes were in error.[5] We disagree.

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[5] A judge generally may not reconsider the ruling of another judge unless the first judge is unavailable. (*International Ins. Co. v. Superior Court* (1998) 62 Cal.App.4th 784, 786, fn. 2; *Curtin v. Koskey* (1991) 231 Cal.App. 3d 873, 876-877; *Williamson v. Mazda Motor of America, Inc.* (2012) 212 Cal.App.4th 449, 454-455.)

As appellant acknowledges, the assignment of different matters that arose in this case to different judges was fully within the authority of the court. Government Code section 69508, subdivision (a), provides that "the presiding judge shall distribute the business of the court among the judges, and prescribe the order of business." (See also *Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 422 [" 'Assignments of the "business" of the court among judges of the court is wholly discretionary.' [Citation.]"].)

"The presiding judge's full authority over judicial assignments is spelled out in [California Rules of Court,] rule 10.603." (*Alvarez v. Superior Court* (2010) 183 Cal.App.4th 969, 978.) Rule 10.603(c)(1) provides that the presiding judge "has ultimate authority to make judicial assignments." Rules 10.603(b)(1)(A) and (B) authorize the presiding judge to "[a]ssign judges to departments" and "[a]pportion the business of the court, including assigning and reassigning cases to departments."

In the exercise of this authority, Sacramento County Superior Court operates a "master calendar" system "whereby cases are assigned to a trial court from a master calendar on the day of trial. But pretrial procedures, case management and settlement are conducted by different judges." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 12:35, p. 12(I)-8; *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1175; Super. Ct. Sacramento County, Local Rules, rules 1.04, 1.05, 2.30, 2.92.)

Appellant maintains that his case should have had an all-purpose assignment to one judge because the case "lasted for seven (7) years."[6] Appellant relies on *People v. Superior Court (Lavi), supra,* 4 Cal.4th at pages 1180-1181, and *Woodman v. Superior Court* (1987) 196 Cal.App.3d 407, 421, for the proposition that complicated and potentially long, drawn-out cases are appropriate for all-purpose assignments.

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[6] Actually, the case lasted just over five years from the filing of the initial complaint on September 29, 2008, to the entry of judgment on October 25, 2013.

To be sure, "[c]omplex litigation should be assigned to one judge for all purposes." (Cal. Stds. Jud. Admin., § 3.10(b).) "The purpose of such assignment is to permit the efficient disposition of complex matters . . . ." (*Woodman v. Superior Court, supra*, 196 Cal.App.3d at p. 421.)

However, appellant does not contend that he ever sought complex case designation or an all-purpose judge assignment. A plaintiff may designate an action "complex" on the civil case cover sheet. (Cal. Rules of Court, rule 3.401.) Here, appellant twice checked the box on a civil case cover sheet that the case "is *not* complex under rule 3.400 of the California Rules of Court." (Italics added.) Nor did appellant file a motion for complex designation. (Cal. Rules of Court, rule 3.403(b).)

Even had appellant designated this case a complex, his claims regarding defects in his apartment and his landlord's failure to repair do not constitute a complex case. (Cal. Rules of Court, rule 3.400(b) [complex case factors include "[n]umerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve," "[m]anagement of a large number of witnesses or substantial amount of documentary evidence," "[m]anagement of a large number of separately represented parties," "[c]oordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court," or "[s]ubstantial postjudgment judicial supervision"]; *People v. Superior Court (Lavi), supra*, 4 Cal.4th at p. 1180 [" 'complex litigation' " involves " 'multiple related cases, extensive pretrial activity, extended trial times, difficult or novel issues, and postjudgment judicial supervision' "].) These factors are not present in this case. (Compare Cal. Rules of Court, rule 3.400(c) [antitrust or trade regulation, construction defect, multi-party securities or investment, multi-party environmental or toxic tort, mass torts, class action, or complex insurance coverage cases designated as provisionally complex].)

4. Collateral Estoppel

Appellant contends that the trial court improperly gave collateral estoppel effect to the rulings in the unlawful detainer case. Appellant argues that the unlawful detainer proceeding did not adjudicate the issues raised in this case and res judicata or collateral estoppel was not pled in the defendants' answer and was therefore waived.

" 'Claim preclusion, often referred to as res judicata, provides that "a valid, final judgment on the merits precludes parties or their privies from relitigating the same 'cause of action' in a subsequent suit." ' " (*Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1325-1326 (*Ayala*).) This case involves issue preclusion, also referred to as collateral estoppel. (*Id.* at p. 1326; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) "*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) "Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action." (*Ibid.*) "[I]ssue preclusion applies: (1) after a final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or in privity with that party." (*Id.* at p. 825; *Lucido, supra,* at p. 341.)

As to the threshold procedural issue appellant raises, unlike res judicata, collateral estoppel need not be pleaded. (*Ponce v. Tractor Supply Co.* (1972) 29 Cal.App.3d 500, 507.) " '[R]es judicata (precluding the relitigation of claims) must be pleaded, while collateral estoppel (a subset of res judicata precluding the relitigation of issues) need not be.' " (*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 89; *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 758.)

Moving on to the substantive requirements, unlawful detainer is a summary proceeding focused on the right of possession, and, accordingly, the preclusive effect of an unlawful detainer judgment is narrow. (*Gombiner v. Swartz* (2008) 167 Cal.App.4th

1365, 1371.) "But when litigants to an unlawful detainer proceeding fully try other issues besides the right of possession, the unlawful detainer judgment is conclusive as to those other litigated issues." (*Ibid.*; *Vella v. Hudgins* (1977) 20 Cal.3d 251, 256-257; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1557.)

Appellant argues that the issues barred in this case were not identical to issues litigated and decided in the unlawful detainer suit.[7] "The identical issue requirement 'addresses whether "identical factual allegations" are at stake in the two proceedings.' " (*Ayala, supra,* 13 Cal.App.5th at p.1327; *Lucido, supra,* 51 Cal.3d at p. 342.) "[I]n determining whether the identity requirement is satisfied, courts must be mindful of the need to distinguish 'issues' from 'legal theories.' " (*Wimsatt v. Beverly Hills Weight etc. Internat., Inc.* (1995) 32 Cal.App.4th 1511, 1517. "Collateral estoppel may act as a bar to subsequent litigation on the same set of facts even though different causes of action are involved. [Citations.] Collateral estoppel bars relitigation of the same issues; it does not require identity of legal theories or causes of action. If it did, there would be no end to litigation for injuries arising out of the same facts, as long as a party could offer another legal theory by which the issue might be differently decided. [Citation.]" (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 746; *Sutphin v. Speik* (1940) 15 Cal.2d 195, 205 ["Defendant has simply offered another legal theory by which the *same issue* might be differently decided"].)

Here, appellant fully litigated the defense of breach of the warranty of habitability in the unlawful detainer proceeding and the court determined it was not borne out by the

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[7] The record does not contain the pleadings or the judgment in the unlawful detainer action and is limited to the transcript of the trial, which both parties offered, and the trial court accepted, as evidence in this case. However, appellant does not dispute that a final judgment was entered in accordance with the court's ruling in the transcript or that the transcript accurately represents the issues litigated and decided in the unlawful detainer case.

evidence. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 631-632.) The factual allegations underlying the causes of action pled in the third amended complaint regarding the defective conditions in appellant's apartment and the landlord's failure to repair them are identical to the issues raised by appellant's warranty of habitability defense in the unlawful detainer action. Appellant maintains he "argued warranty of habitability only" in the unlawful detainer proceeding. But in ruling on the defense based on the evidence presented, the court made factual findings that the defective conditions appellant claimed were "minor inconveniences," "issues that occur every day in apartments . . . [¶] . . . [¶] . . . all across the country -- [¶] . . . [¶] [and] that once complained about, the landlord made prompt repairs." Appellant may not relitigate the findings of the court in the unlawful detainer proceeding regarding the relative seriousness of the defective conditions in his apartment and landlord's repairs, regardless of the different legal theories which appellant alleges in the present case. (*Ayala*, *supra*, 13 Cal.App.5th at p. 1327; *Zimmerman v. Stotter* (1984) 160 Cal.App.3d 1067, 1075-1076 (*Zimmerman*).) Moreover, the court ruled that appellant could not raise the statutory defense of retaliatory eviction based on appellant's default in payment of rent, which factual finding precludes relitigation of an affirmative claim on that ground in this action. (Friedman et al., Cal. Practice Guide: Landlord-Tenant, *supra*, ¶ 7:353, at p. 7-180.)

5. The "Equity First" Rule

Appellant argues the trial court erred in bifurcating the trial and adjudicating his equitable claim for violation of Business and Professions Code section 17200 first without a jury, which led to nonsuit on the section 17200 claim and judgment on all his other claims, including the legal claims, thereby denying his right to a jury trial. We disagree.

When equitable and legal causes of action are asserted in a single lawsuit, trial courts generally try the equitable issues first, and if the determination of those issues disposes of the legal issues, nothing remains to be tried by a jury. (*Orange County Water*

Dist. v. Alcoa Global Fasteners, Inc. (2017) 12 Cal.App.5th 252, 355 (*Orange County Water Dist.*); *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671 (*Raedeke*); *Darbun Enterprises, Inc. v. San Fernando Community Hospital* (2015) 239 Cal.App.4th 399, 408-409 (*Darbun*); *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 157; *Nwosu, supra*, 122 Cal.App.4th at p. 1238.) "Trial courts are encouraged to apply this 'equity first' rule because it promotes judicial economy by potentially obviating the need for a jury trial." (*Darbun, supra*, at p. 409; *Hoopes, supra*, at p. 157; *Nwosu, supra*, at p. 1238.)

There is no right to a jury trial on a Business and Professions Code section 17200 claim by a private plaintiff because the remedies available are purely equitable. (*Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284-285 (*Hodge*).) Appellant, however, has also pled causes of action to which the right to jury trial attaches. (*Moore v. San Vicente Lumber Co.* (1917) 175 Cal. 212, 214 [nuisance claim for damages]; *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1719 [intentional infliction of emotional distress]; *Raedeke, supra*, 10 Cal.3d at p. 671 [breach of contract]; *Guttman v. Chiazor* (2017) 15 Cal.App.5th Supp. 57, 66 [breach of the warranty of habitability, per statute].) Therefore, this case is hybrid of equitable and legal claims and the "equity first" rule applies.[8] (*Nwosu, supra*, 122 Cal.App.4th at p. 1241; *Raedeke, supra*, at p. 671.)

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[8] The situation is different when the government brings a Business and Professions Code section 17200 claim for civil penalties, historically a legal claim as to which there is a right to a jury trial. (*Nationwide Biweekly Administration, Inc. v. Superior Court* (2018) 24 Cal.App.5th 438, review granted September 19, 2018, S250047.) In that case, the "equity first" rule cannot vitiate the right to a jury trial on the legal claim. (*Id.* at p. 456; *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 1006.) However, only the government may collect civil penalties in a section 17200 suit. A private plaintiff is limited to equitable remedies: injunction and restitution. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.) Therefore, this exception to the rule does not apply here.

The trial court properly determined that appellant's Business and Professions Code section 17200 claim disposed of his legal claims because of the "borrowing" aspect of that statute. Section 17200 prohibits " 'unfair competition,' which includes 'any unlawful, unfair or fraudulent business act or practice.' " (*Hodge, supra*, 145 Cal.App.4th at pp. 282-283.) "An 'unlawful' business practice necessarily ' "borrows" violations from other laws making them independently actionable as unfair competitive practices.' " (*Id.* at p. 283; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Borrowed laws include common law claims to which a right to jury trial would ordinarily attach. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196 [where the "unlawful" prong is invoked, a 17200 claim can resemble "any of countless other common law and statutory claims"]; *Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1155 [" ' "[V]irtually any law or regulation—federal or state, statutory or common law—can serve as [a] predicate for [an] . . . 'unlawful' [prong] violation." ' [Citation.]"].)

A Business and Professions Code section 17200 claim that borrows from legal causes of action is not thereby transformed into a legal claim. "Although the unlawful prong of [section 17200] borrows from other laws, it is not a substitute for those laws." (*Hodge, supra*, 145 Cal.App.4th at p. 284; *People ex rel. Feuer v. Superior Court (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1384.) Section 17200 "is not simply a legislative conversion of a legal right into an equitable one. It is a separate equitable cause of action." (*Hodge, supra*, at p. 284.)

The trial court assessed whether appellant could prove the "unlawful" element of his Business and Professions Code section 17200 claim by proving his other claims. The court concluded that he could not. As discussed, the findings in the unlawful detainer trial that the defects in appellant's apartment were minor issues that occur every day in apartments across the country, and were promptly repaired when complained of, barred

appellant's claims about these same conditions for the period from September 1, 2008, to the date of the unlawful detainer decision on January 22, 2009.

The period before September 1, 2008, however, was not covered by the unlawful detainer proceeding. (*Zimmerman, supra*, 160 Cal.App.3d at p. 1076.) For that period, the trial court found appellant could not prove the "unlawful" element of his Business and Professions Code section 17200 claim because of the discovery sanctions order. Indeed, without appellant's testimony, there was not sufficient evidence to prove any of his claims. (*Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 273 [affirming judgment of nonsuit after trial court granted motion to exclude testimony of witness].)

Finally, we note that the present case is not similar to *Darbun* where, in applying the "equity first" rule, the trial court made " 'inconsistent and misleading statements' regarding, among other things, which issues would be decided during the first-phase bench trial." (*Orange County Water Dist., supra*, 12 Cal.App.5th at p. 358; *Darbun, supra*, 239 Cal.App.4th at pp. 409-410.) In *Darbun*, the first phase was to determine whether the equitable remedy of specific performance was available. (*Darbun, supra*, at pp. 409-410.) The trial court assured the parties that the issues of breach of contract and damages were reserved for the jury phase. (*Id.* at p. 411.) However, the trial court ended up deciding these issues, to the prejudice of the plaintiff, which lost the opportunity to abandon the equitable remedy and preserve the right to jury trial on breach of contract. (*Ibid.*) The Court of Appeal held that in cases involving mixed issues of equity and law the trial court may not act as a fact finder on issues specifically reserved for the jury. (*Id.* at p. 402.)

Here, the trial court did not limit the issues it would consider in the equitable phase. Rather, the court said "[w]e're going to start with the Court trial part because I want to hear what it is." The court also specifically informed appellant that, after trying the equitable claim, "in most cases when that's done since the issues are really the same, then there's nothing left for the jury trial part . . . ."

Appellant was not improperly denied a jury trial by application of the "equity first" rule.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

RAYE, P. J.

We concur:

HULL, J.

MURRAY, J.